IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 5, 2004 Session

ROBERT G. ROBINSON v. WENDI DIANA ROBINSON

Appeal from the Chancery Court for Rutherford County
No. 02-4135DR Robert E. Corlew, III, Chancellor

No. M2003-02289-COA-R3-CV

Mother appeals the denial of her request to relocate with the parties' three minor children to Georgia. The trial court found the children spent substantially equal time with the parents, analyzed the proposed relocation pursuant to Tenn. Code Ann.§ 36-6-108(c), held relocation was not in the children's best interest and denied the requested relocation. Mother appeals contending that the trial court erred in determining the time spent with the parents by deducting time the children were in the care of other persons – grandparents, new spouses and babysitters. The deductions resulted in time subtracted from Mother's parenting time and a finding that the parents spent equal time with the children. As a result, the trial court applied the criteria in subsection (c) of Tenn. Code Ann.§ 36-6-108, instead of (d), which Mother contends erroneously deprived her of the statutory advantages afforded by subsection (d). We agree. We also find that the children spent substantially more parenting time with Mother; therefore, Tenn. Code Ann. § 36-6-108(d) applies. Mother's stated purpose for relocating to Athens, Georgia is to obtain an esthetician's license in order to hopefully obtain better employment; however, we have concluded that such does not constitute a reasonable purpose for relocating with the children. The evidence also does not preponderate against the trial court's finding that the proposed relocation is not in the children's best interest. Therefore, we affirm the denial of Mother's request to relocate with the children to Georgia.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and HERSCHEL P. FRANKS, P.J., joined.

Daryl M. South, Murfreesboro, Tennessee, for the appellant, Wendi Diana Robinson.

Donald M. Bulloch, Jr., and Aaron S. Guin, Murfreesboro, Tennessee, for the appellee, Robert G. Robinson.

OPINION

Robert G. Robinson (Father) and Wendi Diana Robinson (Mother) are the parents of three minor children. They were divorced on June 7, 2002 at which time they resided in Rutherford County, Tennessee. Shortly after the divorce Mother sent Father a notice of her intent to relocate to Athens, Georgia with the parties' children.[1] Her stated reason for the move was to pursue educational opportunities that would afford her greater financial opportunities.

Mother grew up in Athens, Georgia and has family and friends in that area. Father grew up in Rutherford County, Tennessee and has family and friends there. Father lived with Mother and their children in Athens until 1998 when he returned to Murfreesboro for better employment. Eight months later Mother and the children moved to Murfreesboro to reside with him. The family resided together in Rutherford County, Tennessee until their divorce.

Father has been a full-time employee of the Murfreesboro Fire Department since 1998 and he works an additional twenty (20) hours a week in the family business.[2] Father was the wage earner for the family during the marriage. Mother's primary responsibility during the marriage was to care for the three children. Since the divorce, she has been employed at the YMCA in Murfreesboro.

Following a contested evidentiary hearing, the trial court denied Mother's relocation finding it was not in the children's best interest to be separated from their father, based upon the relocation criteria in Tenn. Code Ann.§ 36-6-108(c). Mother appeals contending the wrong legal criteria was applied and her relocation should have been approved.

The first issue to be addressed is whether the trial court erred when it determined the parties spent substantially equal amounts of parenting time with the children. If so, the second issue is whether Mother's request to relocate to Georgia should be approved based upon the criteria in subsection (d) of Tenn. Code Ann. § 36-6-108, which is more favorable to her proposed relocation than that applied by the trial court.[3]

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66,

[1] At the time of the hearing, the children were 7, 5 and 3 years old.

[2] Father's parents own a barbecue restaurant, "The Slick Pig," in Murfreesboro, Tennessee.

[3] Father raises one additional issue but due to the outcome of this opinion, his issue is now moot.

71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

Tenn. Code Ann. § 36-6-108 governs parental relocation with children. As the statute provides, the first step of the trial court in a contested relocation matter is to determine the amount of parental time each parent spends with the children. If the court finds that the parents spend substantially equal time with the children then Tenn. Code Ann. § 36-6-108(c) applies and the proposed relocation is subject to an analysis that is based upon the best interests of the child(ren).[4] If, however, the court finds that the relocating parent spends substantially more time with the children, then Tenn. Code Ann. § 36-6-108(d), not (c) applies. Subsection (d) provides a presumption that the parent with the greater amount of parental time should be permitted to move unless the opposing parent can show one of the three enumerated circumstances listed in (d).

Father presented a comprehensive summary of time each parent spent with the children. It was based upon an exceptionally detailed record of dates and times, computed by the hour, for which he had responsibility for the care of the children compared to that of Mother. Father's summary suggested that in the twelve months prior to trial, Father had the children 4,530.25 hours (48.4% of the time) and Mother had the children 4,829.75 hours (51.6%). Mother did not maintain a detailed log and, thus, she did not present detailed time records to contest Father's hourly log. She did provide evidence of the amount of time the children spent with her and with their father; however, her evidence was presented in terms of days and weeks, unlike Father's hourly log. Mother's evidence suggested that she spent 67% of the parenting time with the children.

Without itemizing the hours or days the children spent with each parent, the trial court concluded the children spent substantially equal time with the parents. The trial court explained its reasoning in its Memorandum Opinion. It reads as follows:

[4]Tenn. Code Ann. § 36-6-108(c) states: " If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child. The court shall consider all relevant factors. A non-exclusive list of eleven factors is listed in the statute.

> We find it unnecessary to recount the facts concerning the periods of time spent by the parents with the minor children herein. The father asserts that he has spent more than forty-eight percent of the time with the children, as evidenced by his calendar which was marked Trial Exhibit 2. On cross-examination, however, the father recognized that his calendar credited each parent with time actually spent with persons other than the parties. The mother works at the local YMCA and the children go to work with her through agreement with her employer. The father is a fireman who works for the city and spends twenty-four of each seventy-two hours working. Further, the father works some twenty hours per week at a restaurant operated by his father. The children typically do not accompany him to work at either location. Further, we recognize that there are some differences in quality of time spent. Although the issue of waking time versus sleeping time has been raised previously the statute does not address the same, or has any appellate court yet found it necessary to address the issue. Here, although we find that the evidence preponderates in favor of a finding that the father spends only thirty-two percent of the time with the minor children, the mother spends forty-eight percent of the time, and the children spend twenty percent of the time with other persons, under the terms of the statute, we find it to be our duty to consider the best interests of the minor children. In fairness, the statute is not clearly written, and does not anticipate a number of circumstances that courts are called to consider. . . . We recognize that in a vast number of cases, children will spend time at school, in the care of childcare providers while parents work, and with grandparents and other relatives. Older children can spend substantial periods of time visiting with friends and engaged in activities. We believe that a fair construction of the statute is to provide that where parents each exercise "substantial" periods of time with minor children, we should consider the impact upon the children and the children's best interests. Clearly, both parents exercise substantial periods of time with the minor children and both have substantial impact on the lives of the children.

Though the trial court found that Father spent 32% of the time with the children, Mother spends 48% of the time with the children and "other persons" – grandparents, new spouses and babysitters – cared for the children 20% of the time, it concluded that the children spent substantially equal time with the parents. We respectfully disagree with the methodology employed by the trial court and with the conclusion that the children spend substantially equal time with the parents.

Father's case was dependent upon an exceptionally detailed – by the hour – mathematical computation of the time the children spent with each parent and he contended that the trial court was required to use his data to determine the parenting time with the children. He also contended that the trial court should deduct from Mother's parenting time, the amount of time "others" such as grandparents and babysitters cared for the children in her absence. We find these contentions to be without merit for the following reasons.

A detailed mathematical formula, such as the "hourly log" proposed by Father, would significantly restrict the trial court's discretion when determining whether the children spend substantially more time with one parent. Believing such determinations are best left to the broad discretion of the trial courts, we have repeatedly held that parenting time is not amenable to technical mathematical formulas or so-called "bright line" rules. *See Collins v. Coode*, No. M2002-02557-COA-R3-CV, 2004 WL 904097 at *9-10 (Tenn. Ct. App. Apr. 27, 2004). Moreover, the varied schedules of families with children of any age, and especially the more independent schedules of teenage children, would render the validity of any detailed formula suspect.

Contrary to Father's contention, there is no need for a micro-methodology to determine whether one parent spends "substantially" more time with the children. The key word in the statute is "substantially" and the issue to be decided is whether the children spend "substantially" more time with one parent. Such a determination does not require mathematical precision. As this court explained in *Collins v. Coode*:

> Tenn. Code Ann. § 36-6-108 does not define the term "substantially equal." However, no special definition is required because the common meaning of the words and the phrase are easily understood. The word "substantially" means "essentially," "to all intents and purposes," or "in regard to everything material." 17 OXFORD ENGLISH DICTIONARY 68 (2d ed.1989). Thus, the plain meaning of the term "substantially equal" connotes a relationship that is very close to equality--so close that it may be considered equal.
>
> The courts have not provided bright-line rules for determining whether parents are spending "substantially equal" custodial time with their children. As convenient as a bright-line rule might be, we see no need to adopt one because custody decisions, by their very nature, are inherently fact-dependent. Courts must have flexibility to consider the parents as they find them. However, courts called upon to determine whether parents are spending substantially equal amounts of time with their children should consider, among other things: (1) the terms of the applicable custody and visitation orders, (2) the number of days each parent has actually spent with the child or children, (3) whether the parents are using the full amount of residential time provided them, (4) the length of the period during which the comparison of residential time is being made, and (5) the particular exigencies of the parent's circumstances.

Collins, 2004 WL 904097, at *9-10 (footnotes omitted).

We also reject Father's contention that Mother's parenting time should be reduced when "other persons" assist in the care of the children. In *Price v. Bright*, No. E2003-02738-COA-R3-CV, 2005 WL 166955 at * 6 (Tenn. Ct. App. Jan. 26, 2005) the father argued that the mother should not

be credited for the time the mother's boyfriend cared for the children while she was asleep.[5] *Id.* at *6. (The argument asserted in *Price* is the so-called "waking hours" doctrine.) This court rejected the father's "waking hours" argument and credited the mother for the time her boyfriend cared for the children even though she was asleep part of that time.[6] *Id.* at *10. We rejected similar contentions in *Kawatra v. Kawatra*, No. M2003-01855-COA-R3-CV, 2004 WL 1944135, at *9 (Tenn. Ct. App. Aug. 31, 2004)(holding that the trial court erred in deducting school time from the calculation of the time spent with each parent, since the responsibility of a parent does not end while the child is at school."), and in *Clark v. Clark*, No. M2002-03071-COA-R3-CV, 2003 WL 23094000 at *13-14 (Tenn. Ct. App. Dec. 30, 2003)(holding that there are no cases in which the courts of this state have approved of a comparison of custodial time based upon waking hours only and refusing to adopt the "waking hours" methodology).[7]

As a consequence of the above holding, it is necessary that the amount of parenting time be re-assessed to determine whether one parent spent substantially more time with the children. Instead of remanding the parental time issue, which would cause further delays, we will make our own determination of the amount of time the children spend with their parents.

We need look no further than Father's own testimony to find that Mother spent substantially more time with the children. On cross examination, Father acknowledged that Mother spent more time with the children, as is evident from the following exchange:

> Q. Now, let's do a little math here, Mr. Robinson. One week is your wife's; right?
> A. Yes, sir.
> Q. She has them seven consecutive days, and she uses all of those days, doesn't she?
> A. Most of the time.
> Q. You told me except for a very slight abhoration [sic], she has completely since the divorce, hasn't she?
> A. Yes, sir.
> Q. And the next week is a work week for you. And you may – let's assume you only work two days at the Fire Department that week. You only have the children five days that week and she has them for those two extra days, doesn't she?

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[5] She explained that she had to sleep at times her children were awake due to the fact she worked night shifts.

[6] The *Price* court also rejected a related claim by the mother that "all day Thursday should be counted in her favor since she spends more actual time with the parties' daughter than does [the father] on that day." *Id.*, 2005 WL 166955, at *10. Rejecting the mother's contention, this court explained that it had repeatedly "refused to characterize time spent with a child in this narrow fashion." *Id.* at *10.

[7] The Supreme Court granted a Tenn. R. App. P. 11 petition to review the ruling in *Kawatra* on Feb. 28, 2005. No further action has been taken by that court.

A. Yes, sir.
Q. She would then have them for nine days and you would have them for five days, that two-week period of time, wouldn't she?
A. Yes, sir.
Q. And then the next week is hers again. And she has seven whole days. And that's going to have her up to 16 days, does it not?
A. Yes, sir.
Q. And during that week you're going to – the next week would be your week, but that would be a week you're working three days at the Fire Department. So, you're going to have them four days with you; right?
A. Yes, sir. But that plan was not always followed.
Q. To get you up to nine days. And if she takes them for those three days, she now has had them 19 days while you have had them nine days during that 28-day period, hasn't she?
A. Yes, sir.
Q. And in fact, that's the schedule that was proposed, showing that she was going to be predominant caretaker of these children from the day you all got divorced?
A. Yes, sir.
Q. And that's why in fact she is designated as the custodian of these children in this parenting plan, isn't she?
A. Yes, sir.
Q. And you all do not share these children roughly equal amounts of time, she has them about every 19 out of 28 days?
A. On paper she does.

Based upon these facts, we find the children spend substantially more time with their mother and, therefore, the analysis of the proposed relocation must be conducted pursuant to Tenn. Code Ann. § 36-6-108(d).

Reasonable Purpose

If the parents are not spending "substantially equal" intervals of time with the children, and if the parent spending the greater amount of time with the child is the one seeking to relocate, then relocation "shall" be permitted unless one or more of three statutory grounds are found. Tenn. Code Ann. § 36-6-108(d). The grounds are:

(1) The relocation does not have a reasonable purpose;
(2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change in custody; or
(3) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

Tenn. Code Ann. § 36-6-108(d)(1)-(3).

Mother wishes to relocate to Athens, Georgia to obtain an esthetician's license in attempt to gain employment that would allow her to better financially provide for her children. An increased salary, promotion or career advancement is a reasonable purpose for relocation under the statute. *See Dunkin v. Dunkin,* No. M2002-01899-COA-R3-CV, 2003 WL 22238950 at *5 (Tenn. Ct. App. Sept. 30, 2003); *Butler v. Butler,* No. M2002-00347-COA-R3-CV, 2003 WL 367241 at *2 (Tenn. Ct. App. Feb. 20, 2003); *Leach v. Leach*, No. W2000-00935-COA-R3-CV, 2001 WL 720635 (Tenn. Ct. App. Jun. 25, 2001); *Connell v. Connell*, No. 03A01-9808-CV-00282, 2000 WL 122204 (Tenn. Ct. App. Jan. 25, 2000). Evidence offered at the hearing, however, was not sufficient to sustain Mother's assertions that the move is for a reasonable purpose.

Mother wishes to obtain an esthetician's license. One of the requirements for an esthetician's license is successful completion of an esthetician program. Mother contacted a school in Athens for information regarding the degree, tuition and curriculum. She contends she needs to go to that school in order to obtain the requisite degree to obtain the desired license. Father introduced evidence showing that there were schools that provided the requisite programs in the Nashville area. Mother acknowledged that these schools would provide the requisite degree.

Mother provided a witness who testified that he would allow Mother to work out of his tanning salon in Athens, Georgia, once she received her license; however, no evidence was presented concerning the income or benefits she would receive once she obtained a license.

The trial court did not base its decision upon the criteria of subsection (d) of Tenn. Code Ann. § 36-6-108; however, the trial court made a finding of fact relative to the purpose of Mother's move to Athens, Georgia.[8] After concluding that it was not in the children's best interest to relocate to Georgia, the court stated in its Memorandum Opinion, "Were we required further to consider the purpose of the relocation of the mother, it respectfully appears to us that the schooling which she hopes to attend is equally available to her in middle Tennessee."[9]

The foregoing constitutes a finding of fact by the trial court. We presume the findings of fact by a trial court are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings,* 78 S.W.3d at 296. For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker*, 40 S.W.3d at 71; *The Realty Shop, Inc.*, 7 S.W.3d at 596. The evidence does not preponderate against the trial

[8] We assume the trial court made these additional findings in the event we held that subsection (d) instead of (c) applied.

[9] The trial court also stated, "We would further find that there is no specific threat of harm to the children that would be occasioned by the move, other than the cessation of the relationship of the children with the father, of paternal relatives and the local community with which the children have become familiar. We would find that there is no vindictive motivation on the part of the mother."

court's finding that the schooling she seeks is equally available in the Murfreesboro/Nashville area. Thus, we conclude that Mother's stated purpose – to relocate to Athens, Georgia to obtain an esthetician's license in order to hopefully gain better employment – does not constitute a reasonable purpose for relocating with the children.

Best Interest

We must now determine whether or not it is in the children's best interest to relocate to Georgia. Tenn. Code Ann. § 36-6-108(e).[10] The trial court conducted a best interest analysis and concluded that it was not in the children's best interest to relocate to Georgia. That conclusion was based upon the eleven factors set forth in Tenn. Code Ann. § 36-6-108(e). The trial court's findings are as follows:

1. Both parents have exercised substantial periods of time with the minor children;
2. The mother, if she were to move, clearly is concerned about visitation with the father and will comply with such visitation orders as the Court would direct;
3. Both parents have strong emotional ties with the children;
4. Both parents will provide materially for the minor children, though the father probably has the greater disposition so to provide and the mother has been the primary caregiver;
5. Stability probably is an issue and continuity is at least important in the lives of the older children who are enrolled in school;
6. The father's family unit appears to be the more stable;
7. Both parties are in good mental and physical health;
8. The school record of the older children appears to be good, and the home, school and community records of all children are otherwise unremarkable;
9. Because of the youthful age of the children, no preferences were provided;
10. Physical or emotional abuse is not an issue in determination with regard to the children, although it is clear that the father's sister has had the potential for volatile behavior with respect to the mother of the children;
11. The character and behavior of the father's new wife appears to be satisfactory.

The evidence in the record does not preponderate against the trial court's findings. To the contrary, the evidence established that Father was actively involved in the lives of the children, including church activities, sporting events and day to day parenting activities. The children benefit from an extended family in Rutherford County and actively participate in family celebrations and

[10] If the court finds it is not in the best interest of the child to relocate and denies relocating with the child, but the parent with whom the child resides the majority of the time elects to relocate, the court shall make a custody determination and shall consider all relevant factors. Tenn. Code Ann. § 36-6-108(e).

events. Granted, it is Father's family, but it is a family that has been involved with and cared for the children. In the wake of any divorce, relations between an ex-spouse and their in-laws can be awkward initially but the testimony supported a finding that Father's family is willing and able to help in the care of the children should either parent need that help. To remove the children from their current home, to separate them from their father and extended family for an educational purpose that could be accomplished in Tennessee is not in the children's best interest.

IN CONCLUSION

We find that the children spend substantially more time with their mother and thus Tenn. Code Ann. § 36-6-108(d) applies. Applying that criteria, we find that there is no reasonable purpose for relocating to Georgia with the children. We also find that the evidence does not preponderate against the trial court finding relocation is not in the best interest of the children. Therefore, Mother's request to relocate to Georgia with the children is denied and the judgment of the trial court is affirmed as modified. Costs of appeal are assessed against the appellant, Wendi Diana Robinson.

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FRANK G. CLEMENT, JR., JUDGE